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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, *et al.*,
Appellants,

v.

RONALD REAGAN and
UNITED STATES OF AMERICA,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether 5 U.S.C. § 5305(c)—the alternative pay plan section of the Federal Pay Comparability Act of 1970, 5 U.S.C. § 5301 *et seq.*—is unconstitutional as a consequence of the section's one-House legislative veto provision?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Thomas C. Lipscomb, Anita Longstreet, and Cecilia Westray were plaintiffs in the District Court.

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the District Court (App., *infra*, 1a-13a), granting the defendants' motion for summary judgment, is not yet reported. Because a companion case—*National Treasury Employees Union, et al. v. Ronald Reagan and United States of America*, No. 84-2654—which was not consolidated with the appealed-from opinion, raised virtually identical issues, the District Court addressed these issues in one opinion.

JURISDICTION

Appellants appeal from a judgment order of the District Court entered on July 31, 1985 (App., *infra*, 14a-15a) in an action challenging the constitutionality of 5 U.S.C. § 5305(c). The jurisdiction of the District Court was pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1346 (a)(2). Notice of appeal to this Court was filed on July 31, 1985, in the United States District Court for the District of Columbia (App., *infra*, 16a).[1] This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1252. See *Federal Communications Commission v. League of Women Voters of California*, —— U.S. ——, 104 S.Ct. 3106 (1984); *U.S. v. Will*, 449 U.S. 200 (1980).

Two recent decisions of the Court, in which appeals pursuant to 28 U.S.C. § 1252 were dismissed by the Court, are distinguishable from the instant appeal. In *Heckler v. Edwards*, —— U.S. ——, 104 S.Ct. 1532 (1984), it was held that a direct appeal to this Court does not lie where the appellant challenges *only* the relief granted and *not* the District Court's holding that an Act of Congress is unconstitutional. In *Heckler*, *supra*, the government conceded that it was *not* challenging the constitutional holding of the District Court. Only the District Court's remedy, concerning the respondent class' entitlement, was appealed. This case is quite different from *Heckler* because, while the unconstitutionality of the legislative veto provision of the Pay Comparability Act, 5 U.S.C. § 5305(c)(2) (App., *infra*, 22a), has never been disputed, appellants challenge the District Court's holding with respect to *how much* of the Act beyond the

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[1] Appellants also filed on this date in the same court a notice of appeal to the United States Court of Appeals for the Federal Circuit pursuant to 28 U.S.C. § 1295(a)(2) in order to preserve their right to appellate review in that forum in the event this Court lacks jurisdiction of this appeal. By motion dated August 14, 1985, the Court of Appeals was requested to stay further proceedings pending disposition by this Court of the instant appeal.

veto provision is unconstitutional as a consequence of the inextricable links between the veto provision and the alternative plan provision (§ 5305(c)(1), App., *infra*, 22a). Thus, the holding challenged on this appeal clearly involves the District Court's determination of unconstitutionality.

The instant case, moreover, involves all three aspects of the rationale articulated in *Heckler*, 104 S.Ct. at 1539, as justifying the expediting of a final determination pursuant to 28 U.S.C. § 1252. First, the appealed-from decision implicates separation of powers not only through the original judicial review of the Act and this Court's exercise of discretion to hear the case but also through the Act's delegation of pay adjustment authority from the Congress to the President in the alternative plan provision—a delegation now unfettered by direct Congressional veto as a result of the appealed-from decision. *Id.* Second, a significant impact on the administration of the Pay Act is involved which binds the government and directly affects the pay of members of the legislative and judicial branches, as well as the pay of employees and officials of the executive branch and members of the military services (see *infra*, p. 11). Such an impact implicates the need for certainty in the administration of the law and demands the expeditious review assured by 28 U.S.C. § 1252. *Id.* Finally, where, as here, a holding of unconstitutionality has ramifications beyond the interests of the particular litigants and directly affects the caliber and morale of virtually all federal public servants and military personnel, the public interest is clearly involved to a very significant degree. *Id.* at 1539-1540. Viewed through the filter of *Heckler*, accordingly, the jurisdiction of this Court under 28 U.S.C. § 1252 is evident.

This Court's dismissal of the appeal in *Equal Employment Opportunity Commission v. Allstate Insurance Company*, —— U.S. ——, 104 S.Ct. 3499 (1984), is also distinguishable from the appeal at hand on the basis that

the government agency (EEOC) challenged only the relief ordered by the District Court—dismissal of the enforcement action—not the District Court's holding that the legislative veto provision is unconstitutional. In contrast, appellants herein raise on appeal the holding of statutory unconstitutionality, asserting that § 5305(c) in its entirety is unconstitutional. *But see* dissenting opinion of Burger, C.J., and O'Connor, J., in *EEOC*, *supra*, 104 S.Ct. at 3502 (suggesting that if the District Court had reached its decision on a statutory basis, *i.e.*, a determination of congressional intent, dismissal would be compelled under *Hechler*, *supra*).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 1, of the United States Constitution and Article I, Section 7, Clauses 2 and 3, of the United States Constitution are reprinted in App., *infra*, 17a-18a. The relevant portions of the Federal Pay Comparability Act of 1970, Pub. L. No. 91-656, 84 Stat. 1946, Secs. 2-3, 5 U.S.C. § 5301 *et seq.*, are reprinted in App., *infra*, 19a-25a.

STATEMENT OF THE CASE

1. In this case appellants challenge the constitutionality of the defendants' actions in effectuating pay adjustments for federal General Schedule (GS) employees pursuant to Section 3 of the Federal Pay Comparability Act of 1970, Pub. L. No. 91-656, 84 Stat. 1946, 1949, 5 U.S.C. § 5305(c), which contains a one-House legislative veto provision (App., *infra*, 2a, 22a).[2] The Act provides the statutory mechanism for annual adjustment in the rates of pay of federal employees subject to statutory pay systems (*id.*). Established expressly therein is the congressional policy that federal pay should be comparable to

[2] Hereinafter "Act." References hereinafter to sections are to sections of Title 5, U.S. Code (1982), unless otherwise indicated.

the rates of pay in the private sector for the same work (*id.* at 2a-3a).[3]

Specifically, the Act expressly requires that federal pay rates for employees under statutory pay systems be based on four principles: (1) equal pay for equal work, (2) distinctions in pay reflecting work and performance distinctions, (3) comparability of federal pay rates with those of private enterprise for the same work, and (4) interrelationship of pay levels for statutory pay systems (*id.* at 2a-3a; *see* § 5301(a) and (b), App., *infra*, 19a). Section 5301(c) defines "statutory pay system" to include a pay system under Subchapter III of Chapter 53, Title 5, relating to the General Schedule (*id.*).

The statutory mechanisms by which the pay rate of each statutory pay system must be fixed and adjusted are set forth at §§ 5305 (*id.* at 19a-25a) and 5306. The President is required under these statutory prescriptions to appoint both a Pay Agent (*id.* at 3a; *see* § 5305(a)(1), App., *infra*, 19a-20a) and a three member Advisory Committee on Federal Pay (ACFP) (*id.* at 3a; *see* § 5306).

At the direction of the President the Pay Agent annually prepares a report to the President that compares the rates of pay for the statutory pay systems to private sector pay rates for the same levels of work on the basis of annual surveys conducted by the Bureau of Labor Statistics (BLS), and recommends appropriate adjustments to the statutory pay systems (App., *infra*, 3a; *see* § 5305(a)(1)(A) and (B), App., *infra*, 20a). In preparing this annual report the Agent must consider and include in the report the views and recommenda-

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[3] The Act thereby re-enacted the principle of comparability earlier manifest both in the Federal Salary Reform Act of 1962, Pub. L. No. 87-793, 76 Stat. 832 (hereinafter "1962 Act"), and in the Federal Salary Act of 1967, Pub. L. No. 90-206, 81 Stat. 624 (hereinafter "1967 Act").

tions of the Federal Employees Pay Council (FEPC) (§ 5305(a)(3), *id.*).[4]

The ACFP reviews the Agent's annual report, considers further views and recommendations of employee organizations, government officials, and other experts, and reports its findings and recommendations to the President (§ 5306(b)).

The Act mandates the President to consider the two aforementioned reports and then to adjust the rates of pay of each statutory pay system in accordance with § 5301(a)'s four principles (App., *infra*, 3a; see § 5305(a)(2), App., *infra*, 20a). Pay adjustments are required to be effective as of the beginning of the first applicable pay period commencing on or after October 1 of the applicable year (*id.*). The President is further required to transmit to Congress a report of the pay adjustment, together with the Agent's report and the report of the ACFP (*see* § 5305(a)(3), App., *infra*, 20a).

An alternative plan for adjusting statutory pay rates is also expressly provided for by the Act. If in any year the President considers it inappropriate to make the pay adjustment required by § 5305(a) because of national emergency or economic conditions affecting the general welfare, the Act requires him to prepare and transmit to Congress before September 1 an alternative plan for pay adjustment (*id.* at 3a; *see* § 5305(c)(1), App., *infra*, 22a). The alternative plan must include the reasons therefor and specify the overall percentage of the adjustment in the rates of pay under the General Schedule

[4] The FEPC consists of five representatives of federal employee organizations appointed by the Pay Agent (§ 5305(b)(1), App., *infra*, 21a). The FEPC, in meetings with the Agent, furnishes its views and recommendations concerning the coverage of the annual BLS survey, the rate comparison process, and the adjustment needed to achieve comparability (*see* § 5305(b)(2), *id.*). Appellant AFGE's National President and Executive Vice President have been appointed as two of five FEPC members.

and under other statutory pay systems (*id.*). Such alternative plan becomes effective on the first day of the first applicable pay period commencing on or after October 1 of the applicable year and continues in effect unless, before the end of the first period of 30 calendar days of continuous session of Congress after the date the plan is transmitted, either House adopts a resolution disapproving it (*id.* at 3a; *see* § 5305(c)(2), App., *infra*, 22a-23a). If either House adopts a resolution disapproving the alternative plan, the Act requires the President to adjust pay rates in accordance with § 5305(a)(2) and (3) effective as of the beginning of the first applicable pay period commencing on or after the date on which the resolution is adopted, or on or after October 1, whichever is later (*id.* at 3a-4a; *see* § 5305(m), App., *infra*, 25a).

2. Under the above statutory scheme, in 1979 the President, acting pursuant to § 5305(c), transmitted to Congress an alternative plan with respect to a pay adjustment for General Schedule employees for fiscal year 1980 ranging from 7.0% to 9.89%, and averaging 7.02%, above the rates of pay in effect on September 30, 1979. The plan, which was in lieu of an average comparability increase of 10.4% recommended by the pay agent, became effective under Executive Order No. 12165, October 9, 1979, 44 F.R. 58671, on the first day of the first applicable pay period commencing on or after October 1, 1979, and continued in effect until September 30, 1980 (App., *infra*, 4a).

Again, in 1980 the President transmitted to Congress an alternative plan with respect to a pay adjustment for General Schedule employees for fiscal year 1981 ranging from 9.1% to 10.41%, and averaging 9.1%, above the rates of pay in effect on September 30, 1980. The plan, which was in lieu of an average comparability increase of 13.5% recommended by the pay agent, became effective under Executive Order No. 12248, October 16, 1980, 45 F.R. 69199, on the first day of the first applicable

pay period commencing on or after October 1, 1980, and continued in effect until September 30, 1981 (App., *infra*, 4a).

Similarly, in 1982 the President again transmitted to Congress an alternative plan with respect to a pay adjustment for General Schedule employees for fiscal year 1983 of 4.0% above the rates of pay in effect on September 30, 1982, which was in lieu of an average comparability increase of 18.47% recommended by his pay agent. The plan became effective under Executive Order No. 12387, October 8, 1982, 47 F.R. 44981, on the first day of the first applicable pay period commencing on or after October 1, 1982, and continued in effect until September 30, 1983 (App., *infra*, 4a-5a).

On August 30, 1984, President Reagan submitted the last of the challenged alternative plans to Congress providing for an overall 3.5% increase in salaries under the statutory pay systems effective on the first day of the first applicable pay period that begins after January 1, 1985, in lieu of an average comparability increase of 18.28% recommended by his pay agent (App., *infra*, 5a). The plan became effective under Executive Order No. 12496, December 28, 1984, 50 F.R. 211, on the first day of the first applicable pay period commencing on or after January 1, 1985, and continued in effect until September 30, 1985 (App., *infra*, 5a).

3. Appellants filed suit in July, 1983, pursuant to 28 U.S.C. §§ 1331, 1346, 1361, 2201, and 2202, seeking as herein relevant: (1) a preliminary injunction to enjoin the operation of the alternative pay plan for federal employees' salary increases transmitted to Congress by President Reagan on August 31, 1983; (2) a declaration that alternative plans are unconstitutional based on the one-House veto provision of § 5305(c) and on the nonseverability of the veto provision from the authority for alternate plans under this subsection; and (3) a writ of

mandamus ordering defendants to adjust the rates of each statutory pay system for fiscal years 1980, 1981, 1983, and 1984 in accordance with § 5305(a)(2), because the alternative plans to adjust pay in these fiscal years were invalid.[5] In an unpublished decision issued on October 24, 1983, the District Court denied appellants' motion for a preliminary injunction.

Appellants continued to seek a permanent injunction, declaratory relief, and a writ of mandamus. Upon cross-motions for summary judgment, the appealed-from District Court order granted summary judgment to appellees on July 31, 1985 (App., *infra*, 14a-15a).

4. In the memorandum opinion of July 31, 1985, the District Court first noted that the appellees conceded the unconstitutionality of the one-House legislative veto provision under *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983) (App., *infra*, 8a). The Court found the issue before it to be, therefore, whether the unconstitutional legislative veto provision is severable from the remainder of the alternative pay plan subsection, leaving the alternative pay plan intact (*id.*).

In ruling that the legislative veto provision is severable (*id.* at 10a), the Court rejected the arguments that the one-House legislative veto is an integral and necessary part of the alternative pay plan provision and that Congress would not have passed this provision—which subverts in effect the Act's primary objective of pay comparability—without retaining veto authority over the President's plan (*id.*). In the Court's view the alternative plan provision is an important "safety valve" and thus an

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[5] Because the President's alternative plan for FY 1984 was superceded by legislation enacting the same increase, appellants subsequently withdrew that part of their action concerning FY 1984, and substituted therefor a challenge to the August 30, 1984 alternative plan for FY 1985.

integral part of the comprehensive scheme for setting federal employees' salaries, ensuring *against* automatic comparability pay adjustments without consideration of economic realities (*id.*).

Congress would not have enacted the Act, moreover, without providing an important role for the President, the Court found (*id.* at 11a). In the absence of an alternative plan provision, according to the Court, the President's role would be reduced unacceptably to merely the ministerial function of reporting to Congress the pay recommendations of his Pay Agent and the Advisory Committee on Federal Pay (*id.*).

Without the legislative veto provision the alternative plan mechanism is fully operable, the Court observed (*id.* at 12a). Congress retains oversight by requiring the President to report his alternative plan to Congress, which may override the plan by legislation, the Court noted. Thus, contrary to appellants' assertions, the Court concluded that the severance of the legislative veto provision and retention of the alternative plan provision do not unconstitutionally delegate to the President virtually limitless authority to set federal salaries without Congressional oversight or policy guidelines (*id.*). Accordingly, notwithstanding the unconstitutional provision of the section, § 5305(c) was held to be fully operable as law (*id.*).

STATEMENT OF THE SUBSTANTIALITY OF THE QUESTION PRESENTED

The question presented on this appeal has never been passed upon by this Court and, until the appealed-from decision of the District Court, had never been decided by any court.[6] At stake is the statutory mechanism by

[6] In *McCorkle v. United States*, 559 F.2d 1258, 1262 (4th Cir. 1977), the Court of Appeals addressed the severability of the one-House legislative veto provision in the Federal Salary Act of 1967, Pub. L. No. 90-206, 81 Stat. 624, in an analogous context, conclud-

which adjustments are effectuated to the pay of millions of federal employees and officials and members of the uniformed services, including: (1) individuals whose pay is set forth in the General Schedule (§ 5332(a)), the Foreign Service Schedule (22 U.S. § 3963), and the schedules for the Department of Medicine and Surgery, Veterans' Administration (38 U.S.C. § 4107);[7] positions of the Executive Schedule;[8] the Vice-President;[9] members of Congress;[10] members of the federal judiciary, including this Court;[11] and members of the uniformed services.[12] The constitutionality of § 5305(c) is a question fundamental to the structure and operation of all three branches of our government, for whether Congress or the President should have the authority to determine federal compensation is ultimately at issue. By declaring § 5305(c)(2) unconstitutional—the legislative veto provision—but determining that § 5305(c)(1)—the alternative plan provision—is fully operable, the District Court's final judgment effectively established the President's alternative plan as the mechanism by which pay adjustments are determined. In so doing the Court nullified in effect, if not expressly, the comparability provisions of the Act. Unless the decision below is reversed by this Court, it

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ing *contrary to the appealed-from decision* "that the President's power to fix salaries is not separate from the restriction on this power embodied in the one-house veto. . . . [T]he effectiveness of the President's recommendations depends on the acquiescence of both houses. The legislative history demonstrates that Congress would not have granted the President the power to set . . . salaries without this restriction."

[7] *See* §§ 5301(b) and (c) and 5305(a)(2); App., *infra*, 19a-20a.

[8] *See* § 5318.

[9] *See* 3 U.S.C. § 104.

[10] *See* 2 U.S.C. § 31(2).

[11] *See* 28 U.S.C. § 461(a).

[12] *See* 37 U.S.C. § 1009(b).

will eviscerate the congressional effort to promote the caliber of public servants and the armed forces and to compensate military personnel, as well as executive, judicial, and legislative officials, fairly by making their pay comparable to pay in the private and non-federal public sectors.

1. The District Court determined that the alternative plan provision of the Act is fully operable as a law without the legislative veto provision and that Congress would have enacted the alternative plan procedure without the legislative veto (App., *infra*, 10a). These conclusions of the District Court cannot be squared with the language of the Act, the history of pay legislation prior to the Act, or the Act's legislative history.[13]

a. The District Court totally ignored the language and structure of the Act in reaching its erroneous decision. Congress formally declared the Act's policy and purpose in § 5301 (App., *infra*, 19a):

> (a) It is the policy of Congress that Federal pay fixing for employees under statutory pay systems be based on the principles that—
>
> (1) there be equal pay for substantially equal work;
>
> (2) pay distinctions be maintained in keeping with work and performance distinctions;
>
> (3) Federal pay rates be comparable with private enterprise pay rates for the same levels of work; and

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[13] There is no severability clause in the instant Act. Consequently, the District Court had to "embark on that elusive inquiry," *Chadha, supra*, —— U.S. ——, 103 S.Ct. at 2774, to determine "whether Congress would have enacted other portions of the statute in the absence of the invalidated provisions." *American Federation of Government Employees, AFL-CIO v. Pierce*, 697 F.2d 303, 307 (D.C. Cir. 1982), quoting *Consumer Energy Council of America v. FERC*, 673 F.2d 425 (D.C. Cir. 1982), *aff'd*, —— U.S. ——, 103 S.Ct. 3556 (1983).

> (4) pay levels for the statutory pay systems be interrelated.
>
> (b) The pay rates of each statutory pay system shall be fixed and adjusted in accordance with the principles under subsection (a) of this section and the provisions of sections 5305, 5306, and 5308 of this title.

As herein relevant, the *primacy* in the Act's scheme of the four principles, "in accordance with" which "pay rates *shall* be fixed and adjusted," is explicit, comprising as they do the first subsection of the Act and the *express policy* of Congress. § 5301(b), *id.* [emphasis supplied]. Congressional policy, *after* requiring that the four principles primarily govern pay fixing and ajusting, *also* expressly requires via § 5301(b) that such adjustments be in accordance with sections 5305, 5306, and 5308.[14]

Of the four sections designated by Congress as controlling pay adjustments—§§ 5301, 5305, 5306, and 5308—only § 5305 is affected by the severing of § 5305(c), or of either of its subsections, from the rest of the Act, since in the entire Act only § 5305 refers to or involves at all the alternative plan. Thus, the language of the Act establishes the *paramount* Congressional conclusion and intent in the Act that (1) *specific principles provide the*

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[14] Although the operation of § 5305 is the foremost concern of the case at bar, it is highly pertinent that in the statutory scheme § 5305 is but one of the three sections whose provisions Congress expressly stated should control pay adjustments. Section 5305, of course, provides in part the pay adjusting mechanism, discussed *infra*, at pp. 14-15. Section 5306 establishes the Advisory Committee on Federal Pay (ACFP) "[t]o assist the President in carrying out the policy under section 5301 of this title" (§ 5306(b)) and to prepare findings and recommendations to be reported to the President (§ 5306(b)(3)) *and* transmitted by the President to Congress if "the policy stated in section 5301" is to be carried out (§ 5305(a)(3), App., *infra*, 19a)), as opposed to an alternative plan. Section 5308 limits any pay, no matter how determined, to the rate of basic pay for level V of the Executive Schedule.

basis for federal pay fixing (see § 5301(b), App. *infra*, 19a), (2) an Advisory Comittee on Federal Pay (ACFP) prepare findings and recommendations concerning pay adjustments to be reported to the President and transmitted by him to the Congress (see §§ 5301(b), *id.* and 5306), (3) pay not exceed the rate of basic pay for level V of the Executive Schedule, and (4) pay be adjusted by means of the mechanism set forth in § 5305.

With respect to § 5305 specifically, it is evident that—contrary to the District Court's decision (App., *infra*, 11a)—subsections (a) and (b) establish an essentially ministerial function for the President and his agent, requiring certain actions by the agent (§§ 5305(b), App., *infra*, 19a) pursuant to the preparation of an annual report to the President, including (1) consideration of the views and recommendations of the Federal Employees Pay Council (FEPC) and of other employee organizations not represented on the Council (see § 5305(a)(1) and (b)(1)-(4), App., *infra*, 19a-22a); (2) consideration by the President of the agent's report and of the ACFP's findings prior to adjusting the pay rates in accordance with § 5301(a)'s principles (*see* § 5305(a)(2), App., *infra*, 20a); and (3) transmittal to Congress of a report of the pay adjustment, together with the agent's report and ACFP's recommendations (*see* § 5305(a)(3), *id.*). Subsections (l) and (n)-(r) of § 5305 further define generally—without reference to alternative plans—what rates of pay are effective under § 5305 (*see* 5305(l), *id.* at 24a), the effect of § 5305 pay rates on prior law and adjustments (*see* § 5305(n), *id.* at 25a), and how rates of pay are to be published and effectuated (*see* § 5305 (o)-(r), *id.*).

Only in subsection (c) of § 5305 is the alternative plan exception to the governing principles set forth. Only here is the President given a role that is more than ministerial and delegated authority to act in a manner *inconsistent* with both the policy of Congress and the proce-

dural provisions to implement this policy otherwise manifest in all of the other sections of the Act. Inextricably linked to the statutory establishment of the effective date of any alternative plan in § 5305(c)(2) is the legislative veto clause of that subsection, unequivocally establishing Congress' desire to vacate an alternative plan by means of a resolution of disapproval from either House. *See* § 5305(c)(2), App., *infra*, 22a. If additional indications of Congressional determination to be able to veto an alternative plan are needed, subsections (d)-(k) set forth thereafter a detailed and comprehensive mechanism for Congressional consideration of any disapproval resolution, establishing statutorily thereby the high degree of Congressional concern as to the means to check the Presidential authority to effectuate an exception to the Act's policy (App., *infra*, 23a-24a).

As the foregoing demonstrates, therefore, the language and structure of the Act overwhelmingly evince that Congress intended that (1) first and foremost, pay adjustments be effectuated annually and automatically *in accordance with § 5301(a)'s principles*, (2) the President's role and that of his agent be essentially ministerial in adjusting pay rates within the specific guidelines expressly stated by Congress in the Act, (3) the alternative plan be subordinate in importance to the automatic, annual pay adjustment mechanism and any such plan be considered an exception to the Act's primary intent, and (4) Congress must retain the ultimate control over the exercise of the alternative plan promulgation authority so as to be able to curb when appropriate the Executive's exercise of authority which is legislative in nature.

b. The actions of Congress in the eight years prior to the Act—also overlooked by the District Court—evince Congressional determination to exercise control over pay adjustments for federal employees. The 1962 Federal Salary Reform Act, which established the paramount

principle of pay comparability, required the President to report his recommendations to Congress *for Congressional action.* See 1962 Act, *supra*, § 502, 76 Stat. 841. In 1962-1967 the recommendations of the President were in the form of proposed legislation. Pay adjustments were accomplished by specific acts.[15] In 1967 the Federal Employees Salary Act, *supra*, effectuated a 4.5 percent increase in October, 1967, and authorized the President to make pay adjustments in 1968 and 1969 in order to achieve pay comparability. Pursuant to this grant of authority from Congress, the President adjusted pay in July, 1968 (7.0 percent), and July, 1969 (7.0 percent). Thus, from 1962 until enactment of the instant Act in 1970, Congress clearly retained control of the ultimate pay adjustment authority, although the President was granted specific, limited powers to implement the adjustments.

Against this background, the House proposed in 1969 to set up a permanent mechanism for annual pay adjustments. The House's proposal, H.R. 13000, provided for a Federal Employee Salary Commission, whose function was to submit an annual report to Congress recommending adjustments in rates of pay based on comparability pay surveys and in accordance with certain principles. A member of the Commission could appeal any perceived deviation from comparability principles in the adjustment recommendation to a seven member Federal Employee Salary Board of Arbitration controlled by Congress. The rates of pay submitted by the Commission became effective *after the adoption by both Houses of Congress of a concurrent resolution of approval.* H.R. Rep. No. 91-480, 91st Cong., 1st Sess. (Sept. 9, 1969).

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[15] Pub. L. No. 87-793 (5.5 percent increase effective Oct. 11, 1962; 4.1 percent increase effective Jan. 1, 1964); Pub. L. No. 88-426 (4.2 percent increase effective July 1, 1964); Pub. L. No. 89-301 (3.6 percent increase effective Oct. 1, 1965); Pub. L. No. 89-504 (2.9 percent increase effective July 1, 1966).

Rejecting the House approach, the Senate Committee on Post Office and Civil Service proposed a continuation of the existing situation, that is, pay adjustments in specific amounts effective January 1, 1970, and an extension of the authority, given the President in the 1967 legislation, to make pay increases on the basis of the 1969 comparability effective July 1, 1970. S.Rep. No. 91-582, 91st Cong., 1st Sess. (Dec. 8, 1969), *reprinted in* 1970 U.S. Code Cong. & Admin. News 5915.

Thus, both the House bill (H.R. 13000), which provided virtually no role for the President in a permanent pay adjustment process, and the Senate recommendation, which provided for two specific, limited grants of authority to the President to make adjustments in 1970, clearly contemplated *complete* Congressional retention of the pay adjustment authority, albeit by different mechanisms.

The Act as finally enacted arose from the conference substitute, which generally tracked the provisions and spirit of the House bill. With respect to the substitute, the Conference Report notes under the heading "Pay adjustment" that:

> [t]he most significant difference from the House provision is that the President is directed to make the annual adjustments in the rates of pay; whereas, under the House provisions, adjustments . . . would become effective only after approval by the Congress of adjustments recommended by the Federal Employee Salary Commission.

Conf. Rep. No. 91-1685, 91st Cong., 2d Sess. (Dec. 9, 1970), *reprinted in* 1970 U.S. Code Cong. & Admin. News 5918, 5922. Thus, the "most significant" difference between the House bill and the substitute which became the Act, according to the Conference Report, is that "the President is directed to make the annual adjustment. . . ." *Id.* A Presidential role comparable to that established in the 1967 Act and in S.Rep. No. 91-582, *supra*, was thus defined, except that the Presidential adjustment of rates would be automatic and annual.

In giving the President the authority to direct automatic pay adjustments, there is no indication in the original House bill, the Senate recommendation, or the conference substitute that any *new, uncontrolled or unlimited* grant of authority for the President to effectuate pay adjustments by alternative plans was contemplated. Since the President had effected pay adjustments for the past eight years under Congressional direction, with Congress retaining the ultimate authority, it is reasonable to assume that the continuation of this practice and control was intended by Congress in the Act. Indeed, the means of control—the legislative veto provision of § 5305 (c)—appears to be modeled after the identical provision appearing in the 1967 Act, which provided with respect to the President's annual budget recommendations concerning judicial, legislative, and executive salaries that otherwise automatically effective pay adjustments could be vetoed by disapproving legislation enacted by either House.[16]

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[16] Section 225(i) of the 1967 Act, *supra*, 2 U.S.C. § 359(1) (1976), reads as follows:

> (1) Except as provided in paragraph (2) of this section all or part (as the case may be) of the recommendations of the President transmitted to the Congress in the budget under section 358 of this title shall become effective at the beginning of the first pay period which begins after the thirtieth day following the transmittal of such recommendations in the budget; but only to the extent that, between the date of transmittal of such recommendations in the budget and the beginning of such first pay period—
>
> (A) there has not been enacted into law a statute which establishes rates of pay other than those proposed by all or part of such recommendations,
>
> (B) neither House of the Congress has enacted legislation which specifically disapproves all or part of such recommendations, or
>
> (C) both.
>
> (2) Any part of the recommendations of the President may, in accordance with express provisions of such recommenda-

Concerning the 1967 Act's legislative veto, one Court of Appeals has already concluded that Congress would not have granted the President the power to set salaries without this restriction. *See McCorkle v. United States*, *supra*, 559 F.2d at 1262, quoted *supra*, n.6 at 10. The Court stated, after reviewing the 1967 Act's legislative history:

> *Voiding the one-house veto as unconstitutional while leaving presidential authority intact would increase the President's power over salaries far beyond the intention of Congress.* We are satisfied that the legislative history establishes that Congress would not have delegated authority to the President to establish salaries without the provision for the one-house veto. Thus, § 359(1)(B) creating the veto is inseparable from those parts of the statute that empower the President to make potentially binding recommendations. *If the veto were unconstitutional . . . , the provisions for the President's recommendations to become effective could not stand in isolation.*

Id. [emphasis supplied].

A like analysis would seem to be warranted with respect to the 1970 Act herein at issue, enacted only three years after the 1967 Act and apparently modeled after it insofar as the veto provision is concerned. Clearly, had Congress intended to relinquish any control over pay adjustments to the President on a permanent and unlimited basis in the form of the alternative plan mechanism, this mechanism would have been identified, instead of the role of the President in the automatic adjustment process, as the "most significant" difference between the House bill and the conference substitute.

From the above analysis it is evident that, in enacting the conference substitute, (1) Congress rejected the Sen-

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tions, be made operative on a date later than the date on which such recommendations otherwise are to take effect.

ate approach, which was essentially a continuation of the eight year practice of annual Congressional action, in favor of an automatic annual mechanism not usually involving affirmative Congressional action, (2) Congress rejected the House approach—which eliminated the President's limited prior role altogether, and which required affirmative approval by Congress before annual pay adjustments became effective—in favor of a mechanism by which the President's role in effecting adjustments is essentially ministerial, and (3) Congress did not intend in the alternative plan mechanism to enlarge the authority of the President to adjust pay rates such that traditional Congressional control would be eliminated. The above-described evolution of the Act, thus, is directly contrary to the District Court's determination that § 5305(c)(1) is severable from § 5305(c)(2), and inconsistent with the resulting exercise of unchecked authority by the President and enlargement of the scope of the President's delegated power, which was never intended by Congress. *Cf. McCorkle, supra*, 559 F.2d at 1261, citing *Davis v. Wallace*, 257 U.S. 478, 484 (1922).

c. Comments in the legislative history confirm that Congress did not intend for the alternative plan provision in § 5305(c)(1) to be severable from the legislative veto in § 5305(c)(2). In this regard, statements in the legislative history reveal that § 5305(c)(1) was designed to allow the President some flexibility to recommend deviations from the Act's primary mandate of comparability in very limited and special circumstances and *always* subject to Congressional power to reject any proposed deviation from the *raison d'etre* of the Act: *pay comparability.*

In submitting the report of the committee of conference to the Senate on December 30, 1970, Senator McGee—a Senate conferee—addressed the Senate concern that Congress be able to exercise preemptory authority in Senate debate on the conference bill:

> If for reasons of national emergency, inflation, or whatever other conditions, the President should determine on a pay adjustment other than that recommended by the advisors, he would have the option of submitting an alternative proposal.
>
> Such a proposal would be submitted to Congress, subject to the disapproval of either House within 30 legislative days. The matter would be highly privileged under the rules of House and Senate, and if either House disapproved, the President would be required to implement the original recommendation.

116 Cong. Rec. 44096 (Dec. 30, 1970). Concerning the legislative veto specifically, Senator Fong, another Senate conferee, affirmed that § 5305(c) *"retains for Congress the ultimate decision for putting increases into effect should the President decide against comparability pay adjustments."* *Id.*, at 44097 [emphasis supplied]. And *see* remarks of Senator Packwood, an opponent of the Act, 116 Cong. Rec. 44105 ("At least we have a chance to veto [an alternative plan, whereas under the first one [automatic adjustment] we would not."); and remarks of Senator Stevens, another conference committee member, 116 Cong. Rec. 44105 ("[T]he chairman and the conferees have given the Congress an extra chance to review increases when the President does not follow the Civil Service Commission recommendations.").

An equal concern was expressed in the House debate that the President's authority to deviate from strict comparability be effectively shackled. Remarks of Representative Udall, a co-sponsor of the House bill and a House conferee, confirmed that the legislative veto provision is inextricably linked *to the alternative plan*:

> If the policy [of comparability] is carried out, that is the end of it. There is no point in coming back to the Congress. . . .

> If, however, the President decides to say, "Sorry, I am not going to have a pay raise this year," or if for any other reason he makes any decision other than to achieve the comparability policy, *then it will come back to us, and the bill guarantees that we will have a vote on it.*

Id., at 44284 [emphasis supplied]. This co-sponsor continued:

> If the President does not see fit to make this adjustment, the matter will not end there. Once the bill becomes law the Congress will immediately have the authority to serve as overseer of the President's action on pay matters. *The congressional machinery provided in the bill for overriding an alternative plan submitted by the President will be available to us immediately and I for one intend to hold this administration to the assurances that have been given us.*

Id., at 44285 [emphasis supplied]. As Representative Udall further emphasized: "*Part and parcel to the alternative plan procedures is the congressional review procedure.*" *Id.* [emphasis supplied]. Rep. Udall's comments, as he was a sponsor of the legislation, "deserve to be accorded substantial weight in interpreting the statute." *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976). And *see* concern expressed by Rep. Gross with respect to the automatic adjustment, 116 Cong. Rec. 44286 ("What is here planned, simply stated, is for the Congress to turn over to the President for all time in the future blank-check authority to set the pay of all Federal employees, . . . to divest the Congress of a vital responsibility which it has properly exercised since the founding of this Nation.")

Thus, as the above statements of Congressional intent evince, Congress did *not* intend either to permit the President, under § 3505(c)(1), to set federal pay adjustments contrary to the Act's clear policy of comparability, or to

exercise authority which Constitutionally belongs to Congress, without the legislative check manifest in § 5305 (c) (2).

2. The District Court's holding that, despite the evidence of Congressional intent to the contrary, the alternative plan provision is fully operative and a workable mechanism without the legislative veto provision, and that the veto provision is, thus, severable, is unsupportable for two reasons. First, § 5305(c) (2) clearly restricts a power granted by Congress—the alternative plan authority of § 5305(c) (1). "When the questioned clause restricts a power granted by the legislature, the case against severance is strong." *McCorkle, supra*, 559 F.2d at 1261, citing *Davis v. Wallace, supra*, 257 U.S. at 484. The result of the District Court's striking just the veto clause is that the President has enlarged, virtually unchecked power to set federal pay adjustments effective whenever and in whatever amounts he desired—completely ignoring the overall objectives of the Act manifest in § 5301—by ritualistically invoking the talismanic phrase of § 5305(c) (1) (App., *infra*, 22a): "economic conditions affecting the general welfare." For this reason, § 5305(c) as a whole must be deemed invalid, since "[t]he presumption in favor of severability does not authorize the court to give the statute an effect altogether difference from that sought by the measure viewed as a whole." *Carter v. Carter Coal Co.*, 298 U.S. 238, 313 (1936), quoting *Richwood Retirement Board v. Alton R. Co.*, 295 U.S. 330, 362 (1934). "Where an excepting provision in a statute is found unconstitutional, courts very generally hold that this does not work an enlargement of the scope or operations of other provisions with which that provision was enacted." *Davis v. Wallace, supra*, 257 U.S. at 484.

The severability of subsection (c) (1) from (c) (2) is not appropriate, furthermore, because the statutory authority for the *effectuation* of the alternative plan—

§ 5305(c)(2)—is inextricably tied, and dependent upon, the legislative veto clause. If the elaborate statutory mechanism framed by Congress in § 5305(c) through (m) is not to be disregarded, the alternative plan must be viewed as a *recommendation* which is effective only if Congress "approves" within the 30 day period by not acting to express Congressional disapproval. Congressional inaction, clearly, was intended by Congress to be the equivalent of acquiescence and consent that the delegated authority to contradict the Act's objective by means of an alternative plan be effective only if the delegated power exercised by the Executive is not countermanded or revoked. As the *McCorkle* court stated with regard to the virtually identical veto provision of the 1967 Act: "The Act provides that the President's recommendations for Executive Schedule salaries shall be effective unless (A) Congress enacts a statute which establishes different pay rates or (B) either house disapproves of the recommendations. Thus, *the effectiveness of the President's recommendations depends on the acquiescence of both houses.*" *McCorkle, supra*, 559 F.2d at 1261 [emphasis supplied.]. Because subsection (c)(1) and (c)(2) *together* provide for the preparation, transmittal, *and* effectuation of an alternate plan, (c)(1) cannot be severed from (c)(2), and § 5305(c) in its entirety must be found invalid. "[I]n order to hold one part of a statute unconstitutional and uphold another part as separable, they must not be mutually dependent upon one another." *Carter, supra*, 298 U.S. at 313.

3. While the District Court correctly noted that the alternative pay plan, even without the one-House veto, implements Congress' intent to relieve itself of the burden of setting pay on an annual basis, the result achieved by the appealed-from decision turns the Act on its head. Contrary to the District Court's view (App., *infra*, 11a), the alternative plans do *not* implement Congress' intent to establish pay comparability, since the challenged plans,

in fact, *increase* the gap in comparability between federal and private sector pay. Nor is there persuasive support in the Act's language or legislative history for the more-than-ministerial role for the President which the District Court found so important (*id.* at 11a). In sum the District Court's decision approves federal paysetting by the President, rather than by Congress, subject only to possible legislative check by Congress *providing* a Presidential veto can be overcome. The Act establishes that no such executive usurpation of a traditionally legislative function was intended. A view more consistent with the paramount objectives of the Act, with the Act's language and structure, and with the legislative history, recognizes —contrary to the District Court's decision—that the unconstitutionality of the legislative veto provision voids the entire alternative plan provision of § 5305(c). The remainder of the Act requiring comparability adjustments in pay, however, remains valid and fully operational.

In this regard, it is clear that after severance of § 5305(c) a viable mechanism remains in the Act as set forth in § 5305(a) and (b) and § 5306. The Pay Agent and the ACFP are still appointed by the President and both still function, pursuant to the detailed instructions of Congress in § 5305(a) and (b) and § 5306, to determine the adjustments in pay appropriate to obtain comparability and to realize the other policy objectives set forth in § 5301(a). The President, after reviewing the comprehensive reports of the Agent and the ACFP, still is responsible for adjusting statutory pay systems in October of each year in accordance with the Congressionally defined limits and policy set forth at § 5301(a) and as required by § 5305(a). Thus, after elimination of the alternative plan provision, the President still retains a vital role within the policy limits set by Congress, which is the proper role of the Executive, and the Act still contains a detailed, workable system for adjusting federal salaries to achieve the Act's overall objective: compara-

bility of federal pay with private sector pay. Since "[a] provision is presumed severable if what remains after severance 'is fully operative as a law,'" *Chadha, supra*, 103 S.Ct. 2775, quoting *Champlin Refining Co. v. Corporation Comm.*, 286 U.S. 238, 234 (1936), § 5305(c) must be presumed to be severable from the Act.

CONCLUSION

The question presented by this appeal is substantial and of public importance. The case is one of first impression. It is respectfully submitted that probable jurisdiction should be noted and this appeal set for plenary briefing and argument.

Respectfully submitted,

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APPENDICES

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APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-2654

NATIONAL TREASURY EMPLOYEES UNION, *et al.*,
Plaintiffs,

v.

RONALD REAGAN and
UNITED STATES OF AMERICA,
Defendants.

Civil Action No. 83-1914

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, *et al.*,
Plaintiffs,

v.

RONALD REAGAN and
UNITED STATES OF AMERICA,
Defendants.

[Filed July 31, 1985]

MEMORANDUM

These are actions challenging the constitutionality of the Federal Pay Comparability Act, 5 U.S.C. § 5301 *et seq.*, based on the Act's one-House legislative veto provision, and the authority of the President to implement an "alternative pay plan" under the Act.[1] Presently before

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[1] These cases, which have not been consolidated, raise virtually identical issues, and for convenience, the Court addresses in one opinion the issues pending before the Court.

the Court is defendants' motion for judgment on the pleadings in *National Treasury Employees Union v. Reagan* and cross-motions for summary judgment in both cases. For the reasons set forth below, the Court denies defendants' motion for judgment on the pleadings and grants defendants' motions for summary judgment.

BACKGROUND

Plaintiff American Federation of Government Employees AFL-CIO ("AFGE") is an unincorporated association having its principal place of business in Washington, D.C. It is the exclusive bargaining representative for about 690,000 federal employees. The other named plaintiffs in *AFGE v. Reagan*[2] are members of AFGE who work and reside in the District of Columbia and who are federal employees paid under the General Schedule whose rates of pay were adjusted under the alternative pay plans submitted by the President for fiscal years 1980, 1981, 1983 and 1985 under the Federal Pay Comparability Act ("Pay Act").

Plaintiff National Treasury Employees Union ("NTEU") is an unincorporated association having its principal place of business in Washington, D.C. It is the exclusive bargaining representative for approximately 110,000 federal employees. Named plaintiff Haamid Nuriddin is a member of NTEU who works and resides in the District of Columbia and who, like the AFGE individual plaintiffs, is a federal employee whose pay was adjusted under the 1985 fiscal year alternative pay plan.[3]

The Pay Act provides the statutory mechanism for annual adjustment in the rates of pay of federal employees subject to statutory pay systems. It implements the Congressional policy that federal pay for employees un-

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[2] Thomas C. Lipscomb, Anita Longstreet, and Cecilia Westray.

[3] Other individual plaintiffs in *NTEU v. Reagan* reside outside the District of Columbia.

der statutory pay systems (1) provide equal pay for substantially equal work; (2) maintain pay distinctions in keeping with work and performance distinctions; (3) make federal pay rates comparable with private sector pay rates for the same levels of work; and (4) ensure that pay levels for the statutory pay systems are interrelated. *See* 5 U.S.C. § 5301(a).

The Pay Act directs the President to select a Pay Agent to prepare an annual report comparing rates of pay in private enterprise with rates in the statutory pay systems and recommending appropriate adjustments for federal salaries. 5 U.S.C. § 5305(a)(1). Section 5305(b) establishes procedures to be followed by the Pay Agent in arriving at a recommended increase. After considering the Pay Agent's report and the findings and recommendations of the Advisory Committee on Federal Pay established pursuant to 5 U.S.C. § 5306, the President adjusts the rates of pay of each statutory pay system in accordance with the principles set forth in Section 5301(a). 5 U.S.C. § 5305(a)(2). The pay adjustment becomes effective without any further Congressional action as of the beginning of the first applicable pay period beginning on or after October 1 of the applicable year. *Id.*

If national emergency or economic conditions affecting the general welfare render a pay adjustment required by Section 5305(a) inappropriate, the President may prepare and transmit to Congress before September 1 of that year an alternative plan for pay adjustments. 5 U.S.C. § 5305(c)(1). The alternative pay plan becomes effective on the first day of the first applicable pay period beginning on or after October 1 of that year unless, within 30 days of transmittal, either House adopts a resolution disapproving the alternative pay plan. 5 U.S.C. § 5305(c)(2). If the alternative pay adjustment plan is disapproved, the President must adjust pay in accordance with the four principles of comparability set

forth in 5 U.S.C. § 5305(a)(2), (3). 5 U.S.C. § 5305 (c)(2), (m).

AFGE challenges the President's alternative pay adjustment plans for fiscal years 1980, 1981, 1983 and 1985; NTEU challenges only the fiscal year 1985 plan.

On August 31, 1979, President Carter sent to Congress an alternative pay plan proposing an average increase of 7.02% in GS pay rates for fiscal year 1980, in lieu of an average comparability increase of 10.4% recommended by his pay agent. Neither House of Congress disapproved. On October 9, 1979, President Carter issued Executive Order No. 12165, 44 Fed. Reg. 58671 (1979), which increased GS pay rates by an average 7.02% beginning the first day of the first applicable pay period on or after October 1, 1979, and continuing through September 30, 1980. AFGE Motion for Summary Judgment at 6 ("AFGE Motion"); Defendants' Motion for Summary Judgment in *NTEU v. Reagan* at 8 ("Defendants' Motion").

On August 29, 1980, President Carter sent to Congress an alternative pay plan proposing an average increase of 9.1% in GS pay rates for fiscal year 1981, in lieu of an average comparability increase of 13.5% recommended by his pay agent. Neither House of Congress disapproved. On October 16, 1980, President Carter issued Executive Order No. 12248, 45 Fed. Reg. 69199 (1980), which increased GS pay rates by an average of 9.1% beginning the first day of the first applicable pay period on or after October 1, 1980, and continuing through September 30, 1981, AFGE Motion at 7; Defendants' Motion at 8.

On August 26, 1982, President Reagan sent to Congress an alternative pay plan proposing an average increase of 4% in GS pay rates for fiscal year 1983, in lieu of an average comparability increase of 18.47% recommended by his pay agent. Neither House of Congress

disapproved. On October 8, 1982, President Reagan issued Executive Order No. 12387, 47 Fed. Reg. 44981 (1982), which increased GS pay rates by an average 4% beginning the first day of the first applicable pay period on or after October 1, 1982, and continuing through September 30, 1983. AFGE Motion at 7; Defendants' Motion at 8-9.

On August 30, 1984, President Reagan sent to Congress an alternative pay plan proposing no increase in GS pay rates for the first three months of fiscal year 1985 and an average 3.5% increase beginning the first day of the first applicable pay period on or after January 1, 1985, in lieu of an average comparability increase of 18.28% recommended by his pay agent. Neither House of Congress disapproved. The 3.5% increase became effective on January 1, 1985, continuing through September 30, 1985. AFGE Motion at 7; NTEU Motion for Summary Judgment at 11; Defendants' Motion at 8-9.

DISCUSSION

I.

Defendants contend that this Court does not have jurisdiction over NTEU's and AFGE's actions because under the Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491, they can only be brought in the United States Claims Court. Section 1346(a)(2) gives district courts concurrent jurisdiction with the Claims Court over "any . . . civil action or claims against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department," 28 U.S.C. § 1346(a)(2), that "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *United States v. Mitchell*, 463 U.S. 206, 217 (1983). The Claims Court has exclusive jurisdiction of such claims exceeding $10,000. 28 U.S.C. § 1491.

This Court has concurrent jurisdiction with the Claims Court over AFGE's and NTEU'S claims. Although

AFGE and NTEU seek declaratory and injunctive relief and a writ of mandamus, its actions are really for money damages from the Government—increased federal pay for its members for fiscal years 1980, 1981, 1983 and 1985. District court jurisdiction under the Tucker Act cannot be avoided by framing an essentially monetary claim, such as AFGE's and NTEU's, in terms of injunctive, declaratory or mandatory relief. *Van Drasek v. Lehman*, 762 F.2d 1065, 1071 n. 11 (D.C. Cir. 1985); *Portsmouth Redevelopment and Housing Authority v. Pierce*, 706 F.2d 471, 474 (4th Cir.), *cert. denied*, 104 S. Ct. 392 (1983); *Jesko v. United States*, 713 F.2d 565, 566 (10th Cir. 1983); *Davila v. Weinberger*, 600 F. Supp. 599, 602 (D.D.C. 1985).

Defendants assert, however, that the amount of NTEU's and AFGE's claims must be calculated by aggregating the claims of their respective members, thereby exceeding the $10,000 limit and vesting exclusive jurisdiction to hear these actions in the Claims Court.[4] Defendants' argument is without merit. It is well established that aggregation of claims to establish the jurisdictional amount is permissible "when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest." *Zahn v. International Paper Company*, 414 U.S. 291, 294 (1973). If, however, two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, each plaintiff must satisfy the jurisdictional amount requirement. *Id.; Snyder v. Harris*, 394 U.S. 332, 336 (1969). Here, the members of NTEU and AFGE who are represented by such organizations have separate and distinct claims.

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[4] There is no dispute that this court has jurisdiction under the Tucker Act over the claims of those individually named plaintiffs who reside in the District of Columbia, as they each seek less than $10,000 in money damages. *See* n. 6 at 9.

NTEU v. Nixon, 492 F.2d 587 (D.C. Cir. 1974), which also involved a challenge to the Federal Pay Comparability Act, suggests that aggregation of the individual claims of NTEU's and AFGE's members is impermissible in the actions before this Court. In that case, NTEU sued President Nixon to adjust the pay of federal employees as mandated by the Federal Pay Comparability Act. NTEU sought, *inter alia*, monetary damages on behalf of its members. The Court found that it lacked federal question jurisdiction, which then required that the amount in controversy exceed $10,000, because no individual plaintiff had a claim exceeding that amount. The Court stated that aggregation of individual claims was not permitted under *Snyder v. Harris* for purposes of meeting the jurisdictional amount.[5]

Local Division No. 714 v. Greater Portland Transit District, 589 F.2d 1 (1st Cir. 1978), on which defendants rely, is distinguishable from the instant cases. In *Greater Portland*, the First Circuit held that the plaintiff union, a representative plaintiff, could aggregate the claims of its individual members to establish the $10,000 jurisdictional amount, which was then required for federal question jurisdiction. The Court reasoned that the individual union members were not united merely for litigation convenience and economy, but rather were united "by the Union in conformance with the fundamental premise of collective bargaining that a union is to represent its members in all aspects of the labor-management relationship." 589 F.2d at 10. Significantly, the Court stated that the right to interest arbitration, which was at issue, could not be viewed practically as a right possessed by each employee individually because it could only be exercised collectively, making it a "single right." In contrast, the individual members of NTEU and AFGE possess separate, distinct claims, an increase in their federal

[5] The Court held that subject matter jurisdiction existed based on plaintiff's claim for mandamus relief under 28 U.S.C. § 1361.

pay for the years in question. There is no "single right" at issue. Each member could sue individually for the increased pay he or she seeks.

The government also claims that venue is improper as to those plaintiffs not residing in the District of Columbia. The Tucker Act requires district court actions to be brought in the judicial district where the plaintiff resides. 28 U.S.C. § 1402(a)(1). Venue is proper as to NTEU, AFGE and those individual plaintiffs residing in the District of Columbia.[6] As to the remaining individual plaintiffs, their claims must be dismissed for improper venue.

II.

Defendants concede that the one-House legislative veto in the alternative pay plan section of the Pay Act is unconstitutional under *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983). Thus, the issue before the Court is whether the unconstitutional legislative veto provision is severable from the remainder of the alternative pay plan portion, leaving the alternative pay plan intact.

Plaintiffs argue that the one-House legislative veto is an integral and necessary part of the alternative pay plan provision and that if the legislative veto is severed from the alternative pay plan procedure, the main purpose of the statute, comparability for federal employee salaries, would be subverted. Thus, they contend, it is inconceivable that Congress would have passed the alternative plan provision allowing the President to set federal pay rates without retaining direct veto authority over the President's recommendation. Defendants assert that the alternative pay plan, which was viewed by Congress as a vital safety valve in the pay setting process,

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[6] Haamid Nurridin in Civil Action No. 84-2654 and Thomas C. Lipscomb, Anita Longstreet and Cecilia Westray in Civil Action No. 83-1914.

remains fully operable without the one-House legislative veto since Congress retains authority to review and reject alternative pay plans through its power to legislate.

In *Chadha*, the Supreme Court reaffirmed the test for determining severability of an unconstitutional one-House veto provision. The Court stated that "the invalid portions of a statute are to be severed '[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not.'" *INS v. Chadha*, 462 U.S. at 932. Recently, this Circuit further explained this test in *Alaska Airlines, Inc. v. Donovan*, No. 84-5442 (D.C. Cir. July 16, 1985):

> Only if we conclude that Congress would not have included a provision absent the constitutionally flawed portion is that provision to fall. The issue cannot be whether Congress preferred the statute with the unconstitutional provision over the same statute without that provision. Manifestly, Congress' preference is abundantly clear from its inclusion of the unconstitutional provision. Nor is the question whether Congress would have passed some alternative version of the statute if it knew that it could not lawfully have included the offending provision. That is, "the question is not whether Congress would have enacted th[is] *exact* statute [] had it known at the time of enactment that the legislative veto provisions were invalid, but rather, whether Congress would have preferred th[is] statute [], after severance of the legislative veto provision [], to no statute [] at all." *Gulf Oil Corp. v. Dyke*, 734 F.2d 797, 804 (T.E.C.A.) (emphasis in original), *cert. denied*, 105 S. Ct. 173 (1984).

Slip op. at 19.

There is a presumption of severability of the unconstitutional provision if what remains after severance

is fully operable as law. *INS v. Chadha*, 462 U.S. at 934; *Alaska Airlines, Inc. v. Donovan*, slip op. at 17-18. Plaintiffs thus have the burden of demonstrating that Congress would not have enacted the provision without the severed portion. *Alaska Airlines v. Donovan*, slip op. at 18. Moreover, plaintiffs' burden is made even more difficult by the well-established principle of statutory construction that it is the responsibility of the Court to save and not to destroy, consistent with legislative intent. *Id.* at 19.[7]

Mindful of the foregoing principles, and based on its review of the legislative history of the Pay Act, the Court concludes that the unconstitutional one-House veto provision is severable from the alternative pay plan procedure. Plaintiffs have failed to meet their burden of demonstrating that Congress would not have enacted the alternative pay plan procedure without the legislative veto and that the alternative pay plan is not fully operable as law without the one-House veto.

There is no persuasive evidence that Congress would have preferred no alternative pay plan provision at all to one without a one-House veto. Contrary to plaintiffs' characterization of the alternative pay plan as a limited exception to the principle of comparability which the plan was designed to achieve, the legislative history of the Pay Act indicates that it was an important "safety valve" and an integral part of the comprehensive scheme for setting federal employees' salaries. Congress recognized that comparability of pay adjustments for federal employees might not be feasible or in the nation's interest due to inflation, budget concerns, other economic conditions or national emergencies. (116 Cong. Rec. 44096, 44099, 44103, (1970)). It enacted the alternative pay plan provision to ensure against automatic comparability

[7] It is unclear to what extent the absence of a severability clause, as in this case, affects the determination of whether a provision is severable. *Alaska Airlines, Inc.* v. *Donovan*, slip op. at 17 n.7.

pay adjustments without consideration of economic realities.

Moreover, Congress would not have enacted a comprehensive scheme for pay adjustments for federal employees without providing an important role for the President, even absent the one-House veto. Without the alternative pay plan provision, the President's role would be reduced to merely a ministerial function of reporting to Congress the recommendations of his Pay Agent and the Advisory Committee on Federal Pay. Indeed, the alternative pay plan was proposed as a conference substitute after the Senate rejected an earlier House proposal that bypassed the President altogether and provided for a Federal Employee Salary Commission to recommend to Congress pay adjustments that would become effective upon Congressional approval. The alternative pay plan, even without the one-House veto, implements Congress' intent to relieve itself of the burden of setting federal pay on an annual basis, particularly in election years, and to establish general principles of pay comparability to be implemented by the Executive Branch.

Although the alternative pay plan provision received considerable attention during the floor debate on the Pay Act, there is little discussion of the one-House veto. Much of the criticism of the alternative pay plan was directed at Congress' perceived lack of choice in that it would be left with the pay agent's recommendations to implement if it rejected the President's plan. Instead of relying on the one-House veto, proponents of the alternative pay plan consistently refuted this argument by noting that Congress always had the option of passing a law if it didn't like the President's plan or the pay agent's recommendations. (116 Cong. Rec. 44100, 44101-02, 44104-05, 44284 (1970). Even Representative Udall, who was one of the drafters of the conference committee substitute which contained the alternative pay plan provision and who viewed the one-House veto as a way to guarantee that Congress

would have an opportunity to review the President's plan, recognized that the ultimate means for Congress to ensure control over the pay setting process was to exercise its authority to legislate. (416 Cong. Rec. 44284.)

What remains of the Pay Act without the one-House veto provision is fully operable as a law. If the President submits an alternative pay plan and Congress disagrees, Congress can enact legislation to set the pay adjustment at the level it desires. Indeed, Congress did that in 1984 when it passed the Omnibus Reconciliation Act of 1983, Pub. L. No. 98-270, 98 Stat. 157, which overrode the President's fiscal year 1984 alternative pay plan. Congress also retains oversight by requiring the President to report his alternative pay plan to Congress. Thus, contrary to plaintiffs' assertions, the President is not delegated virtually limitless authority to set federal salaries without any Congressional oversight or without general policy guidelines from Congress for determining pay adjustments.

III.

NTEU argues that even if the one-House veto is severable from the alternative pay plan provision, the 1985 fiscal year alternative pay plan violates the Pay Act because it provides for pay increases effective on the first day of the first applicable pay period beginning on or after January 1, 1985, instead of October 1, 1984, as required by the Pay Act. The Pay Act provides in pertinent part:

> An alternative plan transmitted by the President under paragraph (1) of this subsection becomes effective on the first day of the first applicable pay period commencing on or after October 1, of the applicable year.

5 U.S.C. § 5305(c)(2).

The plain meaning of the statute indicates that the pay plan becomes effective on or after October 1st and that

pay adjustments provided for in the plan become effective as specified in the plan.[8] Moreover, dicta in *NTEU v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974) suggests that that Court found nothing illegal about the alternative pay plan President Nixon submitted to Congress on September 1, 1978, which provided for no salary increase for the first six months of fiscal year 1972 and for a comparability increase for the remainder of the year. Similarly, the fiscal year 1985 pay plan provides for no increase for GS employees for the first three months of the fiscal year and a 3.5% increase effective beginning the first day of the first applicable pay period beginning on or after January 1, 1985.

SUMMARY

This court has jurisdiction under the Tucker Act over the claims of AFGE, NTEU and the individual plaintiffs who reside in the District of Columbia. The claims of all of the members of AFGE and NTEU may not be aggregated to determine Tucker Act jurisdiction.

Applying the standard for severability established in *Chadha*, the Court holds that the unconstitutional one-House veto provision in Section 5305(c)(2) of the Pay Act is severable from the remainder of that section and the Pay Act. Accordingly, the alternative pay plan provision, without the one-House veto, is valid. The 1985 fiscal year alternative pay plan, which provides for a pay adjustment effective the first applicable pay period beginning on or after January 1, 1985, rather than October 1, 1984, is valid under the Pay Act.

/s/ Oliver Gasch
Judge

Date: July 31, 1985

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[8] This Court previously interpreted the Pay Act in this manner when it denied AFGE's motion for preliminary injunction. Memorandum of October 21, 1983 at 3.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-2654

NATIONAL TREASURY EMPLOYEES UNION, *et al.*,
Plaintiffs,

v.

RONALD REAGAN and
UNITED STATES OF AMERICA,
Defendants.

Civil Action No. 83-1914

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, *et al.*,
Plaintiffs,

v.

RONALD REAGAN and
UNITED STATES OF AMERICA,
Defendants.

[Filed July 31, 1985]

ORDER

Upon consideration of defendants' motion for judgment on the pleadings in Civil Action No. 84-2654 and the parties' cross-motions for summary judgment in Civil Action Nos. 83-1914 and 84-2654, the memoranda in support thereof and in opposition thereto, oral arguments of counsel, and the entire record herein, and for the reasons set

forth in the accompanying memorandum, it is by the Court this 31st day of July 1985,

ORDERED that defendants' motion for judgment on the pleadings in Civil Action No. 84-2654 be, and hereby is, denied; and it is further

ORDERED that defendants' motions for summary judgment in Civil Action Nos. 83-1914 and 84-2654, be, and hereby, are granted; and it is further

ORDERED that the claims of the individual plaintiffs in Civil Action 84-2654 who reside outside the District of Columbia be, and hereby are, dismissed for improper venue.

/s/ Oliver Gasch
Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-1914

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, *et al.*,

Plaintiffs,

v.

RONALD REAGAN, *et al.*,

Defendants.

[Filed July 31, 1985]

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the American Federation of Government Employees, AFL-CIO (AFGE) *et al.*, plaintiffs in the above-captioned case, hereby appeal to the Supreme Court of the United States from the final judgment entered in this action on the 31st day of July, 1985.

This appeal is pursuant to 28 U.S.C. § 1252.

Respectfully submitted,

/s/ Charles A. Hobbie
CHARLES A. HOBBIE
Staff Counsel

/s/ Mark D. Roth
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APPENDIX D

UNITED STATES CONSTITUTION

Article I, Section 1. Legislative power vested in Congress

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article I, Section 7, Clause 2. Approval or veto of bills; repassage over veto

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Article I, Section 7, Clause 3. Approval or veto of orders, resolutions, or votes; repassage over veto

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be

necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

APPENDIX E

FEDERAL PAY COMPARABILITY ACT OF 1970

5 U.S.C. § 5301. Policy

(a) It is the policy of Congress that Federal pay fixing for employees under statutory pay systems be based on the principles that—

(1) there be equal pay for substantially equal work;

(2) pay distinctions be maintained in keeping with work and performance distinctions;

(3) Federal pay rates be comparable with private enterprise pay rates for the same levels of work; and

(4) pay levels for the statutory pay systems be interrelated.

(b) The pay rates of each statutory pay system shall be fixed and adjusted in accordance with the principles under subsection (a) of this section and the provisions of sections 5305, 5306, and 5308 of this title.

(c) For the purpose of this subchapter, "statutory pay system" means a pay system under—

(1) subchapter III of this chapter, relating to the General Schedule;

(2) subchapter IV of chapter 14 of title 22, relating to the Foreign Service of the United States; or

(3) chapter 73 of title 38, relating to the Department of Medicine and Surgery, Veterans' Administration.

5 U.S.C. § 5305. Annual pay reports and adjustments

(a) In order to carry out the policy stated in section 5301 of this title, the President shall—

(1) direct such agent as he considers appropriate to prepare and submit to him annually, after considering such views and recommendations as may be submitted under the provisions of subsection (b) of this section, a report that—

(A) compares the rates of pay of the statutory pay systems with the rates of pay for the same levels of work in private enterprise as determined on the basis of appropriate annual surveys that shall be conducted by the Bureau of Labor Statistics;

(B) makes recommendations for appropriate adjustments in rates of pay; and

(C) includes the views and recommendations submitted under the provisions of subsection (b) of this section;

(2) after considering the report of his agent and the findings and recommendations of the Advisory Committee on Federal Pay reported to him under section 5306(b)(3) of this title, adjust the rates of pay of each statutory pay system in accordance with the principles under section 5301(a) of this title, effective as of the beginning of the first applicable pay period commencing on or after October 1 of the applicable year; and

(3) transmit to Congress a report of the pay adjustment, together with a copy of the report submitted to him by his agent and the findings and recommendations of the Advisory Committee on Federal Pay reported to him under section 5306(b)(3) of this title. The report transmitted to the Congress under this subsection shall specify the overall percentage of the adjustment in the rates of pay under the General Schedule and of the adjustment in the rates of pay under the other statutory pay systems.

(b) In carrying out its functions under subsection (a)(1) of this section, the President's agent shall—

(1) establish a Federal Employees Pay Council of 5 members who shall not be deemed to be employees of the Government of the United States by reason of appointment to the Council and shall not receive pay by reason of service as members of the Council, who shall be representatives of employee organizations which represent substantial numbers of employees under the statutory pay systems, and who shall be selected with due consideration to such factors as the relative numbers of employees represented by the various organizations, but not more than 3 members of the Council at any one time shall be from a single employee organization, council, federation, alliance, association, or affiliation of employee organizations;

(2) provide for meetings with the Federal Employees Pay Council and give thorough consideration to the views and recommendations of the Council and the individual views and recommendations, if any, of the members of the Council regarding—

(A) the coverage of the annual survey conducted by the Bureau of Labor Statistics under subsection (a)(1) of this section (including, but not limited to, the occupations, establishment sizes, industries, and geographical areas to be surveyed);

(B) the process of comparing the rates of pay of the statutory pay systems with rates of pay for the same levels of work in private enterprise; and

(C) the adjustments in the rates of pay of the statutory pay systems that should be made to achieve comparability between those rates and the rates of pay for the same levels of work in private enterprise.

(3) give thorough consideration to the views and recommendations of employee organizations not represented on the Federal Employees Pay Council regarding the subjects in paragraph (2)(A)-(C) of this subsection; and

(4) include in its report to the President the views and recommendations submitted as provided in this subsection by the Federal Employees Pay Council, by any member of that Council, and by employee organizations not represented on that Council.

(c)(1) If, because of national emergency or economic conditions affecting the general welfare, the President should, in any year, consider it inappropriate to make the pay adjustment required by subsection (a) of this section, he shall prepare and transmit to Congress before September 1 of that year such alternative plan with respect to a pay adjustment as he considers appropriate, together with the reasons therefor, in lieu of the pay adjustments required by subsection (a) of this section. The report transmitted to the Congress under this subsection shall specify the overall percentage of the adjustment in the rates of pay under the General Schedule and of the adjustment in the rates of pay under the other statutory pay systems.

(2) An alternative plan transmitted by the President under paragraph (1) of this subsection becomes effective on the first day of the first applicable pay period commencing on or after October 1 of the applicable year and continues in effect unless, before the end of the first period of 30 calendar days of continuous session of Congress after the date on which the alternative plan is transmitted, either House adopts a resolution disapproving the alternative plan so recommended and submitted, in which case the pay adjustments for the statutory pay systems shall be made effective as provided by subsection (m) of this section. The continuity of a session is broken only by an adjournment of the Congress sine die, and the

days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of the 30-day period.

(d) Subsections (e)-(k) of this section are enacted by Congress—

(1) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they are deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in the House in the case of resolutions described by this section; and they supersede other rules only to the extent that they are inconsistent therewith; and

(2) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House.

(e) If the committee, to which has been referred a resolution disapproving the alternative plan of the President, has not reported the resolution at the end of 10 calendar days after its introduction, it is in order to move either to discharge the committee from further consideration of the resolution or to discharge the committee from further consideration of any other resolution with respect to the same plan which has been referred to the committee.

(f) A motion to discharge may be made only by an individual favoring the resolution, is highly privileged (except that it may not be made after the committee has reported a resolution with respect to the same recommendation), and debate thereon is limited to not more than 1 hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(g) If the motion to discharge is agreed to, or disagreed to, the motion may not be renewed, nor may another motion to discharge the committee be made with respect to any other resolution with respect to the same alternative plan.

(h) When the committee has reported, or has been discharged from further consideration of, a resolution with respect to an alternative plan, it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion is highly privileged and is not debatable. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(i) Debate on the resolution is limited to not more than 2 hours, to be divided equally between those favoring and those opposing the resolution. A motion further to limit debate is not debatable. An amendment to, or motion to recommit, the resolution is not in order, and it is not in order to move to reconsider the vote by which the resolution is agreed to or disagreed to.

(j) Motions to postpone, made with respect to the discharge from committee, or the consideration of, a resolution with respect to an alternative plan, and motions to proceed to the consideration of other business, are decided without debate.

(k) Appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to a resolution with respect to an alternative plan are decided without debate.

(l) The rates of pay which become effective under this section are the rate of pay applicable, to each position concerned, and each class of positions concerned, under a statutory pay system.

(m) If either House adopts a resolution disapproving an alternative plan submitted under subsection (c) of this section, the President shall take the action required by paragraphs (2) and (3) of subsection (a) of this section and adjust the rates of pay of the statutory pay systems effective as of the beginning of the first applicable pay period commencing on or after the date on which the resolution is adopted, or on or after October 1, whichever is later.

(n) The rates of pay that take effect under this section shall modify, supersede, or render inapplicable, as the case may be, to the extent inconsistent therewith—

(1) all provisions of law enacted prior to the effective date or dates of all or part (as the case may be) of the increases; and

(2) any prior recommendations or adjustments which took effect under this section or prior provisions of law.

(o) The rates of pay that take effect under this section shall be printed in the Federal Register and the Code of Federal Regulations.

(p) An increase in rates of pay that takes effect under this section is not an equivalent increase in pay within the meaning of section 5335 of this title.

(q) Any rate of pay under this section shall be initially adjusted, effective on the effective date of the rate of pay, under conversion rules prescribed by the President or by such agencies as the President may designate.

(r) This section does not impair any authority pursuant to which rates of pay may be fixed by administrative action.